In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1519

HENRY GRADY WHITEHEAD, SR., AND ARMEL DAYTON O'NEAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1971. A petition for rehearing was denied on March 1, 1971. On March 29, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner Whitehead's conviction as a co-conspirator in the scheme to defraud.

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2. Whether a series of judgments recorded against Whitehead were properly admitted into evidence against petitioner O'Neal.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioners and a third defendant, Bailey, were convicted of eight substantive counts and one conspiracy count charging use of the mails and interstate telephone communications to defraud, in violation of 18 U.S.C. 1341 and 1343. On March 10, 1970, petitioner Whitehead was sentenced to concurrent terms of five years' imprisonment on all counts. Petitioner O'Neal was sentenced to concurrent terms of five years' imprisonment on five counts and five years' probation on the remaining counts to commence upon expiration of the term of imprisonment. The court of appeals affirmed.

The evidence disclosed that, in the early part of 1967, O'Neal, Bailey, and one Applewhite met in Whitehead's office in Fort Worth to discuss the formation of a corporation to be known as XIT Corporation (hereinafter referred to as "XIT")[1] ostensibly for the

[1] The name "XIT" was selected to convey the false impression that the corporation was a successor to the XIT Ranch ("XIT" meant "Ten in Texas") which had been a successful and well-known ranching operation in the region. The offices of the corporation were decorated with the XIT branding iron and pictures of ranch scenes. In dealing with prospective suppliers of XIT, as well as with the landlord for the offices, Bailey, O'Neal and one Starkey, named in the indictment as a co-conspirator and the purchasing agent for XIT, deliberately misrepresented that XIT was connected with the famous ranch and therefore had substantial financial backing (See, *e.g.*, Tr. 73–74, 346–347, 446, 601–602).

development of oil leases (Tr. 6–13).[2] On May 19, 1967, O'Neal and Whitehead secured a loan from the Mansfield State Bank for $3,000 with their promissory note. The loan was then deposited in the White Settlement National Bank in the name of XIT (Tr. 28a–29a; 44–48). This opening amount was the highest balance achieved on the XIT account during the life of the corporation (Tr. 59–60). A suite of offices was rented in the name of XIT on the same day (Tr. 19a, 69–70). XIT was incorporated on June 7, 1967 (Tr. 101–104). A spurious financial statement was prepared showing net assets totalling approximately three million dollars including stocks and land holdings never owned by XIT, and a bank balance falsely inflated by $131,000 (Tr. 56–59, 316–334). O'Neal became president of XIT and Bailey became vice-president. They hired Starkey to act as purchasing agent.

On June 5, 1967, Starkey telephoned the Universal Supply Company of Kansas City, Kansas, from the XIT office to arrange the purchase of television sets (Tr. 172–175). In response, the co-owner of Universal Supply, Robert Marvin, flew to Fort Worth and met with O'Neal, Bailey, and Starkey. After being assured of the corporation's solvency (Tr. 347–348), Marvin agreed to supply XIT with a large quantity of television sets and other home appliances on thirty-day credit for an agreed price of $25,626. He was told the sets would be resold in Jamaica (Tr. 211, 214, 216–217, 354–367). Universal Supply shipped the merchan-

[2] "Tr" refers to the three-volume transcript of trial proceedings. We are lodging a copy of this transcript with the Clerk of this Court.

dise to Starkey, who then shipped it to a warehouse in Fort Worth under the control of Whitehead (Tr. 223–232, 371–373, 728–729, 745). Whitehead purchased the goods from XIT, paying a small sum in cash and securing the rest with promissory notes. He, in turn, resold them for $13,000 cash (Tr. 765–767, 774–775, 792–798).

In like manner, XIT purchased on credit quantities of lawn mowers and bicycles from the Huffman Manufacturing Company of Dayton, Ohio, and two fork-lift trucks from the Baker Truck Division of Otis Elevator Company, Dallas, Texas. These were also sold by XIT to Whitehead with his promissory notes as security and resold by him at about half their original purchase price (Tr. 163, 533–564, 589–593, 621, 637, 760–762, 800–810). Other orders were mailed on behalf of XIT for merchandise from the Sony Company and Merit Enterprise, both of New York, the Durham Corporation in Cincinnati, Ohio, and others. These companies, however, never shipped anything to XIT (Tr. 493–528). Altogether, XIT purchased close to $47,000 of merchandise which Whitehead later resold for approximately $24,000. Whitehead defaulted on the seven promissory notes he executed in favor of XIT. XIT was dissolved at the end of August, 1967. XIT's suppliers were never paid for merchandise shipped to the corporation (See, *e.g.*, Tr. 367, 563, 621–622).

ARGUMENT

1. Petitioner Whitehead argues that the evidence was insufficient to support his conviction. The con-

tention is frivolous in view of the facts previously set forth. Whitehead was instrumental in obtaining the funds used to set up XIT and, throughout XIT's existence, remained its only customer. XIT purchased goods solely on credit and then, despite representations to suppliers that the merchandise would immediately be sold at substantial profit, resold them to Whitehead at a nominal profit to the corporation. Whitehead paid for the merchandise with a small amount of cash, the rest of the purchase price being secured by worthless promissory notes. Whitehead then resold the goods at what on paper appeared to be a substantial loss. Significantly, however, Whitehead sold only for cash and was therefore the only one to receive any actual return from the sales which took place. The jury was clearly warranted in concluding under the circumstances that Whitehead wilfully participated in a scheme to defraud XIT's suppliers.

Since the evidence plainly established Whitehead's role in the conspiracy, it is of no consequence that there was no proof he had actual knowledge that interstate mailing and telephone facilities would be used to order merchandise. XIT's obtaining goods from out-of-state suppliers was a necessary part of the scheme to defraud. The jury could readily infer that, as a conspirator, Whitehead reasonably contemplated that the orders would be negotiated and placed through the use of such facilities, as indeed they were. *Pereira* v. *United States,* 347 U.S. 1, 8; *Buie* v. *United States,* 420 F. 2d 1207 (C.A. 5), certiorari

denied, 398 U.S. 932; *Sherwood* v. *United States,* 300 F. 2d 603 (C.A. 5), certiorari denied, 371 U.S. 838.

2. One of the allegations in the indictment was that the defendants knew Whitehead did not intend to honor the promissory notes he executed in favor of XIT. In support of this allegation, the government introduced a series of judgments against Whitehead rendered in 1963 in Tarrant County, Texas. These were based upon his default on 127 promisory notes having a total value of $175,000 (Tr. 702–723). Other evidence showed that, while XIT instituted a lawsuit against Whitehead after his default on the notes, the corporation made no attempt to pursue the suit and it was finally dismissed for want of prosecution in 1969 (Tr. 752–787). The evidence showed that the promissory notes, and hence the supposed transactions between XIT and Whitehead, were a sham.

There is no basis for petitioner O'Neal's contention that the judgments were inadmissible with respect to him. The judgments were properly introduced as part of an effort to show that the conspirators intended to cloak the purchases from XIT by Whitehead with an apparent air of legitimacy, although the defendants knew the XIT notes would be dishonored. Whitehead's failure to honor his own promissory notes in the past, which was a matter of public record, was a fact the jury was entitled to consider in determining the fraudulent intent of the defend-

ants.[3] *New England Enterprises, Inc.* v. *United States,* 400 F. 2d 58 (C.A. 1), certiorari denied, 393 U.S. 1036; *United States* v. *Cobb,* 397 F. 2d 416 (C.A. 7), certorari denied, 393 U.S. 924. Cf. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Even assuming that the judgments were not properly admitted against O'Neal, he makes no showing that he was prejudiced in any way by their admission. He was not a party to the judgments and had no connection with them. Any incidental prejudice to O'Neal resulting from their introduction into evidence was obviated by the trial judge's careful instruction to the jury not to consider the acts of one defendant against another unless done in his presence, adopted by him, or done in furtherance of the conspiracy (Tr. 877–881).

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